

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ADAM GOBER,

Plaintiff,

v.

JOHN NIMAN, et al.,

Defendants.

3:20-cv-00581-MMD-CLB

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹**

Before the court is Plaintiff Adam Gober's ("Gober"), application to proceed *in forma pauperis* (ECF Nos. 4, 1-2)² and his *pro se* civil rights complaint (ECF No. 1-1). For the reasons stated below, the court recommends that Gober's *in forma pauperis* application (ECF No. 4) be granted, and his complaint (ECF No. 1-1) be dismissed with prejudice.

I. IN FORMA PAUPERIS APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable pay such fees or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP]."

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

² ECF No. 4 contains the application to proceed *in forma pauperis* and ECF No. 1-2 contains the required financial certificates.

1 The application must be made on the form provided by the court and must include a financial
2 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavit [must] state the facts as to [the] affiant's poverty with some
4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir.
5 1981) (quotation marks and citation omitted). A litigant need not "be absolutely destitute to
6 enjoy the benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331,
7 339 (1948).

8 A review of the application to proceed IFP reveals Gober cannot pay the filing fee;
9 therefore, the court recommends that the application (ECF No. 4) be granted.

10 **II. SCREENING STANDARD**

11 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A
12 provides, in relevant part, that "the court shall dismiss the case at any time if the court
13 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim
14 upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is
15 immune from such relief." 28 U.S.C. § 1915A(b). A complaint is frivolous when "it lacks an
16 arguable basis in either law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). This
17 includes claims based on legal conclusions that are untenable (e.g., claims against
18 defendants who are immune from suit or claims of infringement of a legal interest which
19 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
20 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th
21 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same
22 standard applied in the context of a motion to dismiss under Federal Rule of Civil Procedure
23 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which requires dismissal
24 where the complaint fails to "state a claim for relief that is plausible on its face," *Bell Atl.*
25 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

26 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*
27 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must

1 accept as true all well-pled factual allegations, set aside legal conclusions, and verify that
 2 the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679
 3 (2009). The complaint need not contain detailed factual allegations, but must offer more
 4 than “a formulaic recitation of the elements of a cause of action” and “raise a right to relief
 5 above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is taken in reviewing
 6 the pleadings of a *pro se* party, for a more forgiving standard applies to litigants not
 7 represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Still, a liberal
 8 construction may not be used to supply an essential element of the claim not initially pled.
 9 *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is appropriate, a *pro se*
 10 plaintiff should be given leave to amend the complaint and notice of its deficiencies, unless
 11 it is clear that those deficiencies cannot be cured. *Cato v. United States*, 70 F.3d 1103,
 12 1107 (9th Cir. 1995).

13 **III. SCREENING OF COMPLAINT**

14 In his complaint, Gober sues Defendants Assistant District Attorney John Niman and
 15 District Court Judge Michael P. Villani under 42 U.S.C. § 1983. (See ECF No. 1-1.) The
 16 complaint relates to Gober’s underlying state criminal case and specifically his post-
 17 conviction habeas corpus petition. (*Id.*) Gober alleges that the Defendants, who were the
 18 attorney and judge assigned to his habeas case, “entered into an illegal conspiracy” to
 19 deprive Gober of trial documents in an effort to sabotage his habeas appeal. (*Id.*) Gober
 20 seeks \$3 million in damages from each defendant and for the sentence in his underlying
 21 case to be vacated. (*Id.* at 11.)

22 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority
 23 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d
 24 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)).
 25 The statute “provides a federal cause of action against any person who, acting under color
 26 of state law, deprives another of his federal rights[.]” *Conn v. Gabbert*, 526 U.S. 286, 290
 27 (1999), and is “merely . . . the procedural device for enforcing substantive provisions of the

1 Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).
2 Claims under § 1983 require the plaintiff to allege (1) the violation of a federally-protected
3 right by (2) a person or official who acts under the color of state law. *Anderson*, 451 F.3d at
4 1067.

5 However, § 1983 is not a backdoor through which a federal court may overturn a
6 state court conviction or award relief related to the fact or duration of a sentence. Section
7 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts
8 “for claims of unconstitutional treatment at the hands of state officials, . . . [but] they different
9 in their scope and operation.” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir. 2003) (quoting
10 *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take care to prevent
11 prisoners from relying on § 1983 to subvert the differing procedural requirements of *habeas*
12 *corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at 486-87; *Simpson v.*
13 *Thomas*, 528 F.3d 685, 695 (9th Cir. 2008). When a prisoner challenges the legality or
14 duration of his custody, raises a constitutional challenge which could entitle him to an earlier
15 release, or seeks damages for purported deficiencies in his state court criminal case, which
16 effected a conviction or lengthier sentence, his sole federal remedy is a writ of *habeas*
17 *corpus*. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997); *Heck*, 512 U.S. at 481; *Wolf v.*
18 *McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Simpson*,
19 528 F.3d at 692-93. Stated differently, where “a judgment in favor of the plaintiff would
20 necessarily imply the invalidity of his conviction or sentence,” then “the complaint must be
21 dismissed unless the plaintiff can demonstrate that the conviction or sentence has already
22 been invalidated.” *Heck*, 512 U.S. at 487.

23 It appears that Gober is challenging the constitutionality of his state court criminal
24 conviction. Consequently, he must demonstrate that his conviction has been overturned to
25 proceed in an action under § 1983. As he has not done so, his sole relief is a *habeas corpus*
26 action.

27 ///

1 Additionally, the court notes that Defendants Judge Villani and District Attorney
2 Niman are absolutely immune from suit under § 1983. *See Schucker v. Rockwood*, 846
3 F.2d 1202, 1204 (9th Cir. 1988) (“Judges are absolutely immune from damage actions for
4 judicial acts taken within the jurisdiction of their courts.... A judge loses absolute immunity
5 only when [the judge] acts in the clear absence of all jurisdiction or performs an act that is
6 not judicial in nature.”); *see also Imbler v. Pachtman*, 424 U.S. 409, 427, 430 (1976) (state
7 prosecutors are absolutely immune from § 1983 actions when performing functions
8 “intimately associated with the judicial phase of the criminal process.”).

9 Accordingly, the court recommends that Gober’s complaint be dismissed, with
10 prejudice, as amendment would be futile. *See Cato*, 70 F.3d at 1107.

11 **IV. CONCLUSION**

12 For the reasons articulated above, the court recommends that Gober’s application to
13 proceed *in forma pauperis* (ECF No. 4) be granted, and his complaint (ECF No. 1-1) be
14 dismissed with prejudice.

15 The parties are advised:

16 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
17 Practice, the parties may file specific written objections to this Report and Recommendation
18 within fourteen days of receipt. These objections should be entitled “Objections to
19 Magistrate Judge’s Report and Recommendation” and should be accompanied by points
20 and authorities for consideration by the District Court.

21 2. This Report and Recommendation is not an appealable order and any notice
22 of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District
23 Court’s judgment.

24 **V. RECOMMENDATION**

25 **IT IS THEREFORE RECOMMENDED** that Gober’s application to proceed *in forma*
26 *pauperis* (ECF No. 4) be **GRANTED**;

27 **IT IS FURTHER RECOMMENDED** that the Clerk **FILE** the complaint (ECF No. 1-1);

1 and,

2 **IT IS FURTHER RECOMMENDED** that Gober's complaint (ECF No. 1-1) be
3 **DISMISSED WITH PREJUDICE.**

4 **DATED:** November 5, 2020.

5 
6 **UNITED STATES MAGISTRATE JUDGE**